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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 JERRY W. WILLIS,

11 Plaintiff,

No. CIV S-04-1926 GGH

12 vs.

13 JO ANNE B. BARNHART,
14 Commissioner of Social
Security,

15 Defendants.

ORDER

16 _____/
17 Introduction and Summary

18 Plaintiff, Jerry Willis, 48 years old at the time of his 2004 administrative hearing,
19 seeks review of the final decision of the Commissioner denying him disability insurance benefits
20 (Title II). For the reasons given below, judgment in plaintiff's favor must be made, and remand
21 to the Commissioner must be ordered for the purpose of more fully developing the record and
22 answering the questions which cannot be legitimately answered on the present record.

23 Background

24 Plaintiff filed for disability benefits on June 13, 2002, soon after his trucking
25 business failed/closed alleging "deteriorating disc in neck, crushed left arm with artery bypass,
26 broken left ankle, hyperthyroidism, migrains (sic)." (Tr. 53). Although plaintiff had ceased to

1 drive trucks, he managed four drivers and the business aspects of hauling gravel up to April
2 2002. In fact he earned \$66,000 in 2002. The ALJ found that these earnings constituted
3 substantial gainful activity and plaintiff was not entitled to any disability findings for previous
4 periods on account of this income. This finding is not disputed here. Thus, the earliest plaintiff
5 could be found disabled is May 2002 and subsequent.

6 Administrative Law Judge Mark Ramsey made the following formal findings:

- 7 1. The claimant meets the nondisability requirements
8 for a period of disability and Disability Insurance
9 Benefits set forth in Section 216(i) of the Social
10 Security Act and is insured for benefits through the
11 date of this decision.
- 12 2. The claimant has not engaged in substantial gainful
13 activity since the alleged onset of disability.
- 14 3. The claimant's degenerative disc disease of the
15 cervical spine, and degenerative joint disease of the
16 left ankle. He is also status post injuries to the left
17 upper extremity in 1984 with vascular surgical
18 repair are considered "severe" based on the
19 requirements in the Regulations 20 CFR §
20 404.1520(c).
- 21 4. These medically determinable impairments do not
22 meet or medically equal one of the listed
23 impairments in Appendix 1, Subpart P, Regulation
24 No. 4.
- 25 5. The undersigned finds the claimant's allegations
26 regarding his limitations are not totally credible for
the reasons set forth in the body of the decision.
6. The claimant has the residual functional capacity to
perform a full range of light exertional work. In
particular, he can stand and walk for six hours in ½
hour increments and lift and carry twenty pounds
occasionally and ten pounds frequently. The
claimant can sit for six hours and occasionally bend,
climb and balance. The claimant is limited in
pushing with the left lower extremity and should
avoid working at heights and around moving
machinery.
7. The claimant is unable to perform any of his past
relevant work (20 CFR § 404.1565).

8. The claimant is a “younger individual between the ages of 45 and 49” (20 CFR § 404.1563).
9. The claimant has a “high school (or high school equivalent) education” (20 CFR § 404.1564).
10. The claimant has the residual functional capacity to perform substantially all of the full range of light work (20 CFR § 404.1567).
11. Based on an exertional capacity for light work, and the claimant’s age, education, and work experience, Medical-Vocational Rule 202.21, Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of “not disabled.”
12. The claimant’s capacity for light work is substantially intact and has not been compromised by any nonexertional limitations. Accordingly, using the above-cited rule(s) as a framework for decision-making, the claimant is not disabled.
13. The claimant was not under a “disability,” as defined in the Social Security Act, at any time through the date of this decision (20 CFR § 404.1520(g)).

(Tr. At 21-22)

Issues

Plaintiff raises as issues:

1. The ALJ failed to consider all of plaintiff’s impairments;
2. Plaintiff’s treating physician’s opinion was improperly rejected on plaintiff’s residual functional capacity, and the examining psychologist’s opinion was improperly rejected as well;
3. The ALJ’s credibility analysis was deficient;
4. Use of the Grids was inappropriate.¹

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¹ Plaintiff claims “five principal errors,” but only enumerates four.

1 The court finds that the consulting psychologist's opinions were improperly
 2 rejected, and that further record development was required. The court need not discuss the
 3 remaining issues.

4 Discussion

5 A. Mental Health Problems

6 In early 2004, plaintiff was evaluated by psychologist (Konrad Reichurdt). This
 7 report depicted plaintiff as markedly impaired by sequellae from his 1984 accident and trauma to
 8 the head. (Tr. 138-143). Cognitive testing indicated organic brain damage. His mental
 9 intelligence was below average. (The report indicated that plaintiff did not even know the
 10 identity of the current President of the United States.) The clinician's diagnostic impressions
 11 included major depression, mood disorder, panic disorder, post traumatic stress disorder and
 12 learning disorders. Indeed this clinician noted that plaintiff had suffered brain damage, cerebral
 13 contusions, and ischemic attacks. Plaintiff suffered "Serious Symptoms with serious impairment
 14 in social, Psychological, Physical and occupational activities." In conclusion:

15 The claimant would be prone to episodes of emotional
 16 deterioration from stress encountered in the workplace because of
 17 his panic attacks and depression with rage reactions from
 18 frustration and periodic worsening. He has significant brain
 19 damage resulting in severe cognitive deficits. Affect, interest and
 20 everyday activities are disturbed. He becomes angry/panicky under
 21 stress. He has a poor learning curve and is not likely to profit from
 22 training. He seems very weak (sic) and fragile. He shows very
 23 poor reaction to change. He is not likely to follow instructions
 24 well. He does not seem to get along with others. He is limited
 25 intellectually. He is not able to keep track of time well enough to
 26 be at work on time....He could not travel by himself to work as he
 becomes to (sic) disoriented and confused. He could not stand or
 sit for any period of time. His concentration and pace are not
 adequate for a normal job. He would be a danger to himself and
 others on the job....

(Tr. 142-43).

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1 If this opinion were accurate, under any definition of “severe impairment,”
 2 plaintiff was severely impaired.² Yet the ALJ completely rejected the opinion of this examining
 3 psychologist, and would not find even that plaintiff’s mental condition qualified for the rather de
 4 minimis threshold of “severe impairment.” The ALJ correctly noted (with the exception of
 5 treatment for migraine headaches) that plaintiff had not been treated for any complaints of a
 6 mental disorder or brain damage, and somewhat correctly noted that “this report is entirely
 7 inconsistent with the remainder of the record; the report contains inconsistent factual information
 8 and is contrary to the claimant’s own testimony at the hearing.” (Tr. 18).

9 The opinion of an examining physician is, in turn, entitled to
 10 greater weight than the opinion of a nonexamining physician.
 11 Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir.1990); Gallant v.
 12 Heckler, 753 F.2d 1450 (9th Cir.1984). As is the case with the
 opinion of a treating physician, the Commissioner must provide
 “clear and convincing” reasons for rejecting the uncontradicted
 opinion of an examining physician.

13 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996).

14 To a certain degree the ALJ was correct. Except with respect to migraine
 15 headaches and a 1984 significant head trauma which did have some noted residual effects, see
 16 (Tr. 166, 157) (stuttering since injury), the medical record does not contain episodes of mental
 17 health difficulties. “Two question depression screens” at the VA facility where plaintiff
 18 underwent his most recent treatment resulted in negative findings. (Tr. 146, 158.) It is difficult
 19 from a layperson’s standpoint to believe that plaintiff had been able to drive trucks throughout
 20 the 1990s, and recently supervise the running of his truck business with four employees up
 21 through April 2002, if he had mental problems of this severity in the recent past. Further, if
 22

23 ²An impairment is not severe only if it “would have no more than a minimal effect on an
 24 individual’s ability to work, even if the individual’s age, education, or work experience were
 25 specifically considered.” SSR 85-28. The purpose of step two is to identify claimants whose
 26 medical impairment is so slight that it is unlikely they would be disabled even if age, education, and
 experience were taken into account. Bowen v. Yuckert, 482 U.S. 137, 107 S. Ct. 2287 (1987). “The
 step-two inquiry is a de minimis screening device to dispose of groundless claims.” Smolen v.
Chater 80 F.3d 1273, 1290 (9th Cir. 1996).

1 plaintiff had such severe mental problems, it is curious that none of plaintiff's treating physicians
2 noted such. Nevertheless, neither the ALJ nor the undersigned is expert in the progressive effects
3 of head trauma injuries, and whether they must be fully apparent from the very start, or whether
4 the more severe effects can have a later onset where they then cross over the line between
5 adequate maintenance of life activities and an inability to cope or compensate. This is not a
6 situation where the examining physician's report was simply based on the subjective complaints
7 of the person examined, or was otherwise bereft of objective manifestations of medical problems.
8 Rather, extensive medical testing was performed. Given this seemingly extensive, recent testing,
9 the ALJ's somewhat correct characterization of the record is not clear and convincing. It raises
10 more questions that it answers. At the very least, it was incumbent upon the ALJ to acquire
11 counter-medical evidence.

12 B. Remaining Issues

13 The court need not definitively opine on plaintiff's remaining issues. To the
14 extent it is found on remand that plaintiff does have significant mental defects, use of the grids
15 would be inappropriate. Moreover, plaintiff's mental medical condition may have much to do
16 with credibility. However, nothing in this order prohibits the ALJ from acquiring further
17 evidence on plaintiff's neck condition. The treating physician did indicate that her rather
18 extensive lifting restrictions might change on review of the MRI (a question which was never
19 later posed to her). While the MRI did relate that "there is no evidence for significant neurologic
20 compromise," (Tr. 178), the MRI did reveal various moderate disc bulges which might account
21 for plaintiff's pain. At least, it would not hurt matters to obtain a clarification of the meaning of
22 the MRI with respect to its impact on the treating physician's lifting restrictions. The court is
23 further confused by the ALJ's finding that plaintiff could not perform his past work (which in the
24 recent past simply involved supervision and business matters in his trucking business) with a
25 finding of an ability to perform light work. This is especially so in that the dated consultative
26 examination did not rely at all on a review of medical records.

1 ACCORDINGLY, plaintiff's Motion for Summary Judgment is granted, the
2 Commissioner's Cross Motion for Summary Judgment is denied. This matter is remanded to the
3 Commissioner pursuant to sentence four of 42 U.S.C. §405(g) for further findings in accordance
4 with this order.

5 DATED: 1/18/06

6
7 /s/ Gregory G. Hollows

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9 UNITED STATES MAGISTRATE JUDGE

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